

No. 78-518

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

**NACIREMA OPERATING CO. AND TRAVELERS
INSURANCE CO., PETITIONERS**

v.

**DOROTHY LYNN AND DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR**

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT**

**BRIEF FOR THE FEDERAL RESPONDENT
IN OPPOSITION**

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A14-A18) is reported at 577 F. 2d 852. The opinion of the Benefits Review Board (Pet. App. A7-A11) is reported at 6 B.R.B.S. 314. The administrative law judge's decision (Pet. App. A2-A6) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1978. A petition for rehearing was denied on June 28, 1978. The petition for a writ of certiorari was filed on September 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the 1972 amendment to the Longshoremen's and Harbor Workers' Compensation Act, which extends death benefits to the survivors of a worker who dies after having been permanently disabled in an employment-related injury, applies to a worker who dies after 1972 but was injured before that date.

2. Whether the application of the amended death-benefit provision to workers injured before 1972 violates the Fifth Amendment.

STATEMENT

William Lynn, a longshoreman employed by petitioner Nacirema Operating Co., was seriously injured in 1957 in the course of his work. Because he was totally and permanently disabled by the injury, Lynn received benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, until he died of a heart attack on December 14, 1975.

Following his death, Lynn's widow, respondent Dorothy Lynn, filed a claim for death benefits under Section 9 of the Act, 33 U.S.C. 909. That Section provides that a death benefit shall be paid to survivors of a covered employee if he dies as the result of an injury sustained on the job, or if he suffers permanent total disability because of the injury and later dies from other causes.

Petitioners refused to pay the claim on the ground that prior to the 1972 amendments to the Act, Section 9 had provided that death benefits were to be awarded only when death is caused by the injury, and not when death results from other causes. Because Lynn was injured prior to the effective date of the 1972 amendments, petitioners argued, his survivors should not be entitled to the death benefits provided by the amended Section 9. The administrative law judge ruled, however, that because

Lynn's death occurred after the 1972 amendments took effect, his widow's rights are governed by the terms of the Act as amended. Therefore, because William Lynn died while suffering from an employment-related permanent total disability, the administrative law judge awarded the statutory benefits to respondent Lynn (Pet. App. A3-A4). The Benefits Review Board affirmed, noting that it had reached the same result in several prior cases (Pet. App. A8-A9). The court of appeals in turn affirmed the Board in a brief opinion (Pet. App. A16-A18).

ARGUMENT

The decision of the court of appeals in this case is correct and is consistent with the decisions of the other three courts of appeals that have considered the issue. See *St. Louis Shipbuilding & Steel Co. v. Casteel*, No. 77-1769 (8th Cir. Aug. 23, 1978); *Norfolk, Baltimore & Carolina Lines, Inc. v. Director, Office of Workers' Compensation Programs*, 539 F. 2d 378 (4th Cir. 1976), cert. denied, 429 U.S. 1078 (1977); *State Insurance Fund v. Pesce*, 548 F. 2d 1112 (2d Cir. 1977). Moreover, the decision is consistent with the many decisions that have applied previous amendments to Section 9 to cases in which the injuries have occurred before the amendments, but the deaths have occurred afterwards. See *Penn Jersey Welding Co. v. Lowe*, 183 F. 2d 936 (3d Cir. 1950); *Hampton Roads Stevedoring Corp. v. O'Hearne*, 184 F. 2d 76 (4th Cir. 1950); *Travelers Insurance Co. v. Toner*, 190 F. 2d 30 (D.C. Cir.), cert. denied, 342 U.S. 826 (1951); *Brown-Pacific Maxon Co. v. Cardillo*, 91 F. Supp. 968 (S.D. N.Y. 1950). All of these courts have held—correctly, in our view—that the statutory right to death benefits does not accrue until the time of the employee's death, so that the law in effect at the time of death governs. Under this approach, the application of the amended statute in the instant case is not retrospective.

Even if the application of the 1972 amendments to this case could be characterized as retrospective, however, no constitutional provision would be violated. Courts ordinarily apply the law in effect at the time the case is before them, not the law in effect at the time of the events giving rise to the litigation, even though this may create some retrospective application. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974).¹

Petitioners argue that this Court's decision in *Usery v. Turner Elkhorn Mining Co.*, *supra*, supports their contention that to apply Section 9, as amended, to post-amendment deaths of employees who suffered pre-amendment injuries would violate the Fifth Amendment. To the contrary, *Turner Elkhorn* directly supports the result reached by the court of appeals in this case. In *Turner Elkhorn* the Court upheld against a due process challenge a provision of the Black Lung Benefits Act of 1972, 30 U.S.C. 901 *et seq.*, that provided death benefits to survivors of miners disabled by pneumoconiosis. As in the case of the 1972 amendments to the Longshoremen's Act, the death benefits were payable to survivors of miners who had contracted the disease prior to the effective date of the Act. The Court sustained the application of the statute not only to miners who died

¹Several other provisions of the 1972 amendments have been held applicable in post-amendment proceedings even though the proceedings have been based on pre-amendment injuries. See *Overseas African Construction Corp. v. McMullen*, 500 F. 2d 1291, 1297-1298 (2d Cir. 1974) (transfer of liability for successful claimants' attorneys' fees from claimants to employers); *Dillingham Corp. v. Massey*, 505 F. 2d 1126, 1129 (9th Cir. 1974) (same); *Matthews v. Walter*, 512 F. 2d 941, 946 (D.C. Cir. 1975) (same); *Cooper Stevedoring of La., Inc. v. Washington*, 556 F. 2d 268, 271-273 (5th Cir. 1977) (liberalized time-limitation provisions); *C & P Telephone Co. v. Director, Office of Workers' Compensation Programs*, 564 F. 2d 503, 510 (D.C. Cir. 1977) (expanded "second-injury" provision).

after the statute's enactment, but also to those who died prior to its enactment. Since the present case involves a claim on behalf of an employee who died after the effective date of the Act, the result in this case follows a fortiori from the analysis in *Turner Elkhorn*.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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